IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM GREGORY MILLINER, Plaintiff,	:	CIVIL ACTION
	:	NO. 98-CV-467
v.	:	
G. DAVID ENCK, THOMAS ENCK, JOHN ENCK, i/d/b/a ENCK BROTHERS DRYWALL, a Partnership, Defendants.	:	

M E M O R A N D U M

BUCKWALTER, J. May 7, 1998

As a result of his discharge, Plaintiff, William Gregory Milliner ("Milliner") instituted this action against his former employer, Enck Brothers Drywall ("Enck Brothers"), and the brothers three, G. David Enck, Thomas Enck, and John Enck, owners/managers of Enck Brothers (collectively "Defendants"). Presently, before the court is Defendants' request that portions of Milliner's complaint be dismissed and/or stricken; Milliner's untimely response and motion to file an amended complaint.[1] For the following reasons, Defendants' requests for dismissal are granted, their requests to strike are dismissed and denied and Plaintiff's motion to amend is granted.

1. Milliner's response was due on April 17th. By stipulation Milliner was granted a ten day extension until April 27th. On the 27th Milliner's counsel called chambers and explained that rather than make the trip to Philadelphia to file the response she would mail it from Lancaster Pennsylvania on April 27, 1998. The response was not received by the Clerk until May 1, 1998.

I. BACKGROUND[2]

When Milliner was hired by Enck Brothers in November 1994 he became the company's only African-American employee of a staff of more than thirty-five. Milliner maintains that he was hired only to fulfill an affirmative action requirement necessary for the company to win a federal construction contract. Enck Brothers was awarded the contract.

Although hired as a drywall hanger, Milliner was never trained in this capacity. He performed only janitorial duties and was only allowed to work on the federal construction job for one day. Moreover, Milliner faced continuous racial taunts while at work which were witnessed by, and on occasion perpetrated by, the three Enck brothers. On February 13, 1996 Milliner filed a complaint alleging racial discrimination in the workplace with the Lancaster County Human Relations Commission. On February 14, 1996 Milliner was terminated.

After exhausting his administrative remedies Milliner instituted this action alleging: Count I: Violation of Title VII, 42 U.S.C.§§ 2000(e)-2(a); 2000(e)3 and as further amended by the Civil Rights Act of 1991, codified in pertinent part at 42 U.S.C. § 1981a (racial discrimination and retaliation); Count II: Violation of the Civil Rights Act of 1866, 42 U.S.C. 1981

2. When considering defendants' Motion to Dismiss, we accept the well-plead facts of the complaint as true and accurate.

(racial discrimination); Count III: Violation of the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. Stat. Ann. § 951 et seq (racial discrimination); Count IV: Breach of Contract; Count V: Breach of the Covenant of Good Faith and Fair Dealing; Count VI: Wrongful Discharge and Count VII: Civil Conspiracy. Milliner requests permission to file an amended complaint, which I grant. In his amended complaint Milliner withdraws his Breach of Covenant of Good Faith and Fair Dealing and Wrongful Discharge claims, Counts V and VI, and "refines" Count IV: Breach of Contract.

II. DISCUSSION

A. Count I: Individual Liability under Title VII.

Count I alleges liability against Enck Brothers and the three individual Enck brothers. Defendants argue that Title VII does not provide for individual liability. In response Milliner provides only one brief paragraph containing wholly unrelated legal argument.

Generally, individual employees are not held liable under Title VII. Sheridan v. E.I. DuPont de Nemours and Co., 100 F.3d 1061, 1077-78 (3d Cir. 1996)(en banc). In the instant case however, the three Enck brothers are more than employees or supervisors, they are the actual owners and makeup the entity Enck Brothers. Thus, I must determine whether individual owners are liable under Title VII. In reviewing a similar issue, at

least two courts within this district have declined to impose liability on the managing partner of a law firm. Harper v. Casey, 1996 WL 363913 * 2 (E.D. Pa. June 28, 1996); Caplan v. Fellheimer Eichen Braverman & Kaskey, 882 F.Supp. 1529 (E.D. Pa. 1995); See also, Clarke v. Whitney, 907 F.Supp. 893, 895 (E.D.Pa. 1995)(Holding that a principal shareholder and officer is not individually liable under the ADA). Faced with the issue at hand, at least one circuit court and several other district courts, including one within the Third Circuit, have held that the owner of a business is not individually liable under Title VII or under identical provisions of the Americans with Disabilities Act ("ADA"). See e.g., EEOC v. AIC Security Investigations, 55 F.3d 1276 (7th Cir. 1995) (Sole shareholder of employer not individually liable under ADA); Manns v. The Leather Shop Inc., 960 F.Supp. 925 (D.Virgin Islands 1997)(Sole owner of business not liable in her individual capacity under Title VII); White v. Midwest Office Technology, Inc., 979 F. Supp. 1354, 1356 (D.Kan. 1997)(owner not individually liable under Title VII); Velasquez v. Mirv Coffee, Inc., 1996 WL 706910 (S.D.N.Y Dec. 12, 1996)(same).

I agree with those courts that have found against owner liability. In enacting Title VII, Congress made clear its intention to protect small businesses, those with less than fifteen employees, by exempting them from onerous Title VII

liability and litigation. Thus, to hold individual owners liable would clearly be at odds with congressional intent. Many courts have recognized this inconsistency. See e.g., Tomka v. Seiler Corp., 66 F.3d 1295, 1313-17 (2d Cir. 1995); AIC Security, 55 F.3d at 1279; Miller v. Maxwell's Intern Inc., 991 F.2d 583, 587 (9th Cir. 1993). Additionally, in amending Title VII through the Civil Rights Act of 1991 Congress added a sliding scale for damages based on the number of employees of the liable party. The lowest cap is $50,000 for employers of more than 14 but less than 101 employees. Yet there is no damages provision for individual owners. See 42 U.S.C. § 1981(a)(b)(3)(A); Tomka, 66 F.3d at 1314; AIC Security, 55 F.3d at 1281; Harper, 1996 WL 363913 * 3. Furthermore, many courts have been quick to note that exempting owner liability from Title VII does not permit owners who discriminate to escape unscathed. Owners will necessarily feel the pinch of the employing entity's liability if plaintiffs successfully "pierce the corporate veil" and demonstrate that the owner is actually the "alter ego" of the employer. See e.g., AIC Security, 55 F.3d at 1282 n.11; Velasquez, 1996 WL at *2; White, 979 F. Supp. at 1356.

Based on the foregoing I find that individual owners cannot be held liable under Title VII and therefore dismiss the three individual Enck brothers as defendants in Count I.

B. Availability of Punitive Damages and Jury Trials under the PHRA.

Defendants seek to have Milliner's request for punitive damages and a jury trial in his PHRA claim, Count III stricken. The Pennsylvania Supreme Court has not spoken directly as to whether a party may recover punitive damages under the PHRA. Defendants rely on a recent decision from a divided panel of the Pennsylvania Superior Court which vacated a judgment for punitive damages under the PHRA. Hoy v. Angelone, 691 A.2d 476, 483 (Pa. Super. 1997)("We are unpersuaded that such damages are recoverable under the PHRA and are reluctant to allow such a recovery in absence of more definitive guidance by our high court."). Before Hoy, courts within this district consistently found punitives available under the PHRA . See e.g., Smith v. General Elec. Co., 1996 WL 24762, at *6 (E.D.Pa. January 22, 1996); Jackson and Coker, Inc. v. Lyman, 840 F.Supp. 1040, 1050 (E.D.Pa. 1993)("Courts of this District have overwhelmingly concluded that there is a right to punitives under the PHRA"); Galeone v. American Packaging Corp., 764 F.Supp. 349, 351 (E.D.Pa. 1991)(collecting cases). They reasoned that inherent in the authority granted under the PHRA to award "any other legal and equitable relief as the court deems appropriate" was the authority to award punitives. 43 P.S. § 962(b)(1986), as amended by, § 962(c)(1)(1991). Even after Hoy I and several of my

colleagues have declined to depart from this reasoning. See e.g., Bellack v. County of Montgomery, 1997 WL 688821 (E.D.Pa. Oct. 8, 1997); Kim v. City of Philadelphia, 1997 WL 277357 (E.D.Pa. May 21, 1997); Gould v. Lawyers Title Insurance Corporation, 1997 WL 241146 (E.D.Pa. May 7, 1997). Presently, Defendants have not persuaded me otherwise. Accordingly, Milliner's request for punitive damages in Count III remains.

Likewise, Defendants' request that Milliner's jury demand be stricken is also denied. Although two appellate panels have held that there is no right to a jury trial under the PHRA Pennsylvania's Supreme Court has not spoken on the issue. See Wertz v. Chapman Township, --A.2d--, 1998 WL 67225 (Pa. Commw. Feb. 20, 1998)(Leadbetter J., dissenting in part); Murphy v. Cartex Corp., 546 A.2d 1217 (Pa. Super. 1988). Several courts within this district, in predicting how Pennsylvania's Supreme Court may rule on the issue, have declined to adopt this holding, instead noting, in part, that when including "equitable relief" as an available remedy under the PHRA, Pennsylvania's legislature envisioned that such equitable relief would be obtained through a trial by jury. See e.g., Linsalata v. Tri-State General Ins. Ltd., 1992 WL 392586 *2, 3 (E.D.Pa. Dec. 17, 1992); Galeone, 764 F.Supp. at 353-54; Lubin v. American Packaging Corp., 760 F.Supp. 450, 452 (E.D.Pa. 1991); Welker v. Smithkline Beckman, 746

F.Supp. 576 (E.D.Pa. 1990). Thus, as the issue remains in flux I decline to strike Milliner's request for a jury trial.[3]

C. Count IV: Breach of Contract

Milliner alleges that contrary to his employment agreement with Enck Brothers, he was never trained to hang drywall and did not receive a drywaller's salary. Defendants correctly note that Milliner's allegations fail to state a claim for breach of contract. In Pennsylvania the "employment-at-will" doctrine applies absent a clear intention by the parties to the contrary. Clay v. Advance Computer Applications Inc., 536 A.2d 1375, 1382 (Pa. Super. 1988). Under this doctrine an employee can be discharged at any time "for any reason." Anderson v. Haverford College, 851 F.Supp. 179, 181 (E.D.Pa. 1994). Thus, the right to terminate at-will necessarily includes the right of the employer to alter compensation and work assignments. See Green v. Bettinger Co., 608 F.Supp. 35, 42 (D.C. Pa. 1984). The burden is on the employee to prove that the parties had an intention to overcome the at-will presumption and to create an employment relationship different than at-will employment.

3. As an aside, I agree with Judge Leadbetter's dissent in Wertz insofar as she notes that to disallow jury trials in PHRA claims when jury trials are available in Title VII claims, which are often tied to PHRA claims, could easily lead to inconsistent results and forum shopping. Because a jury trial would be available to a Title VII/PHRA plaintiff in federal court, but not in state, a PHRA plaintiff would have no incentive to utilize the state system.

DiBonaventura v. Consolidated Rail Corp., 539 A.2d 865, 867 (Pa. Super. 1988).

Miller's allegations, even when taken as true, fail to meet this burden. The agreement in question was not attached to Milliner's complaint and no reference is made to specific portions of such agreement that provide for drywall training and compensation. Furthermore, I find Milliner's lone allegation that "Defendants promised Plaintiff that he would be trained to hang drywall and that Plaintiff would receive a salary commensurate" insufficient to demonstrate existence of an oral contract. (Complaint ¶ 17). See Clay, 536 A.2d at 1383 (A party who wishes to enforce a contract must plead every element of that contract specifically and clarity is particularly important when the contract is oral). I am also unwilling to construe Milliner's allegation that he purchased drywall equipment from Defendants at his own expense as a sufficient to support a claim of breach of an implied contract. See Darlington v. General Electric, 504 A.2d 306, 314 (Pa. Super. 1986)(Claims of breach of implied contract must contain specific allegations that the aggrieved employee provided special consideration other than the services for which he was hired) Id. Accordingly, I dismiss Milliner's breach of contract claim.[4]

4. Defendants ask that Milliner's request for punitive damages in his breach of contract claim be stricken. This request is moot in light of my dismissal of the claim.

D. Count VII: Civil Conspiracy.

Milliner claims that his inadequate training and compensation, the racially hostile environment he was forced to work in and his ultimate termination were all the result of Defendants' conspiracy.

To sustain a claim of civil conspiracy under Pennsylvania law, a plaintiff must prove that two or more persons intentionally combined to commit an unlawful act or to commit an otherwise lawful act by unlawful means. Skipworth by Williams v. Lead Industries Association, Inc., 690 A.2d 169, 174 (Pa. 1997). A claim for civil conspiracy can proceed only when there is a cause of action for an underlying act. Nix v. Temple University, 596 A.2d 1132, 1137 (Pa. Super. 1991).

Milliner's allegations of inadequate training and compensation stem from the underlying act of breach of contract. The remaining allegations stem from the underlying acts of violation of Title VII and the PHRA. I have already dismissed Milliner's breach of contract claim, therefore, insofar as his conspiracy claims is based on these allegations, the claim is insufficient as no underlying cause of action exists.

As to his allegations of conspiracy to violate the PHRA, Defendants are correct this claim is preempted by the PHRA. As noted above, the PHRA provides a statutory remedy that precludes assertion of a common law tort action based on

discriminatory practice prohibited by the Act. Clay, 559 A.2d at 918. Therefore, Milliner cannot maintain an independent common law claim of conspiracy when a key allegation of such claim is that Defendants engaged in practices prohibited under the PHRA. See id; see also, Bennett v. Independence Blue Cross, 1993 WL 65812 *2 (E.D.Pa. March 12, 1993).

Finally, as to allegations that Defendants conspired to violate Title VII, the Supreme Court's decision in Great American Federal Savings & Loan Association v. Novotny, 442 U.S. 366 (1979), dictates dismissal. The Novotny Court expressly stated that no cause of action under 28 U.S.C. § 1985(3) exists for conspiracy to violate Title VII. Novotny, 442 U.S. at 376. This holding is equally applicable to claims of civil conspiracy. See e.g., Seiple v. Community Hosp. of Lancaster, 1998 WL 175593 (E.D.Pa., Apr. 14, 1998)(Relying on Novotny to dismiss claim of civil conspiracy to violate the ADA); Bennett, 1993 WL 65812 * 2 (Relying on Novotny to dismiss claim of civil conspiracy to violate the ADEA). Thus, Milliner's civil conspiracy claim is dismissed.

An appropriate Order follows.

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O R D E R

AND NOW, this 7th day of May 1998, upon consideration of Plaintiff's motion to amend the complaint (Docket No. 5) and Defendants' motion to dismiss and strike (Docket No. 3) and Plaintiff's response (Docket No. 5), it is hereby **ORDERED** that Plaintiff's motion to amend is **GRANTED** and Defendants' motion to dismiss and strike is **GRANTED,** in part, and **DENIED**, in part. Accordingly, the following is further ordered:

(1) Defendants, G. David Enck, Thomas Enck, John Enck are **DISMISSED** as to Count I;

(2) Counts IV and V of the amended complaint are **DISMISSED;**

(3) Defendants' request to strike Plaintiff's prayer for punitive damages and a jury trial in Count II of the amended complaint is **DENIED**;

(4) Defendants' requests to strike Plaintiff's prayer for punitive damages in Counts V and IV of the original complaint are **DISMISSED** as moot; and

(5) Defendants' request to strike paragraph 78 of the original complaint is **DISMISSED** as moot.

BY THE COURT:

RONALD L. BUCKWALTER, J.